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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO and OUACHITA LOCAL 654,

Petitioners,

v.

MISCO, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR PETITIONERS

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1. Respondent attempts in two different ways to dispute our contention that the decision below conflicts with decisions of other courts of appeals as to the scope of the "public policy" exception to enforcement of arbitration awards. Respondent argues first that there is no conflict at all among the circuits over the scope of the "public policy" exception, and second, that if there is such a conflict, it is inapplicable to cases involving safety. Both efforts are unavailing.

a. Respondent challenges our statement that the District of Columbia and Ninth Circuits have held the public

policy exception applicable only to arbitration awards that conflict with positive law. Respondent does not dispute our reading of the D.C. Circuit's decision in *American Postal Workers Union v. United States Postal Service*, 789 F.2d 1 (D.C. Cir. 1986), which squarely held that an arbitration award can be set aside as violative of public policy only if the award conflicts with positive law. But, respondent suggests, the D.C. Circuit in another case, *United States Postal Service v. Nat. Ass'n of Letter Carriers*, 789 F.2d 18 (D.C. Cir. 1986), while "admittedly . . . not[ing] the narrow scope of the public policy exception," nonetheless broadened that exception by "*consider*[*ing*] the Postal Service's broader public policy argument that the Postal Service's operations 'are not to be subjected to a patchwork of conflicting state laws.'" (Br. Op. 3; emphasis in Br. Op.). Respondent has simply misunderstood the latter decision.

The *Letter Carriers* decision expressly adopted (789 F.2d at 19) the legal standard announced three days earlier in *American Postal Workers*. In *Letter Carriers*, the court merely applied that standard to determine whether an arbitration award requiring the Postal Service to comply with a Tennessee statute conflicted with the Supremacy Clause (the Postal Service contending that the Tennessee statute was preempted). The court, concluding that the award did not conflict with the Supremacy Clause, rejected the "public policy" argument in accordance with the *American Public Workers* standard. 789 F.2d at 20-21.[1]

Respondent's attempt to undermine our reading of the Ninth Circuit's decisions is equally wide of the mark.

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[1] The only other District of Columbia Circuit decision cited by respondent, *Office & Prof. Emp. v. Wash. Metro. Area Tr. Auth.*, 724 F.2d 133 (D.C. Cir. 1983), preceded those discussed in text, and did not present any question respecting the scope of the public policy exception announced in *Grace*. The dictum quoted by respondent appeared in a general delineation of the principles applicable to the enforcement of arbitration awards.

Respondent does not challenge our showing that the Ninth Circuit held inconsistency with law to be the limit of the public policy exception in *Amalgamated Transit Union v. Aztec Bus Lines*, 654 F.2d 642, 644 (9th Cir. 1981) and *Bevles Co., Inc. v. Teamsters Local 986*, 791 F.2d 1391 (9th Cir. 1986), *pet for cert. pending*, No. 86-431. But, respondent contends, the Ninth Circuit in a decision that preceded these had construed the public policy exception more broadly (Br. Op. 4-5, citing *World Airways, Inc. v. International Brotherhood of Teamsters, Airline Division*, 578 F.2d 800 (9th Cir. 1978)). *World Airways* is not inconsistent with the Ninth Circuit's more recent decisions; rather, unlike those decisions, *World Airways* involved an award that indeed *was* found to conflict with positive law. In that case an air carrier removed a pilot whose past performance, the carrier believed, demonstrated an incapacity to conform to safety regulations. Federal Aviation Act regulations require an air carrier to remove a pilot falling into this category. An arbitrator, disagreeing with the carrier's assessment of the pilot's capabilities, ordered the pilot reinstated. The Ninth Circuit set the award aside on the ground that "federal law clearly places the responsibility upon the airline [not the arbitrator] to determine whether or not a pilot possesses the judgment to serve as a Pilot-in-Command," *id.* at 803. Thus the award was set aside because, in overturning the airline's determination, the award violated federal law.

b. Respondent's second basis for attempting to deny the existence of a circuit conflict—that "safety" cases are different from other public policy cases—is doubly defective: the circuit conflict has been manifested in "safety" cases as well as others, and in any event there can be no basis for treating safety cases differently from other invocations of public policy without first resolving the dispute that is at the heart of the existing circuit conflict.

The Ninth Circuit's decision in *Aztec Bus Lines, supra, did* involve a claim that the award was inconsistent with

public safety—and in circumstances far more compelling than those present here—yet the Ninth Circuit enforced an arbitrator's award of reinstatement because no law forbade the employer's compliance. In *Aztec*, a bus driver "was involved in a number of accidents and mishaps during his first year of employment," 654 F.2d at 643, and was fired after the last of them. The arbitrator ordered the driver's reinstatement (converting the discharge to a two-week suspension). "[T]he arbitrator refused to consider all but one of those incidents as a basis for imposing sanctions" because the employer had not complied with the collective bargaining agreement's prescribed procedures for investigating and determining responsibility for accidents, *id.* at 643. With respect to the one "properly documented incident," the arbitrator concluded that the driver had "exhibited extremely poor judgment," but that that "incident, standing by itself, did not warrant dismissal," *id.* at 643-44. The Ninth Circuit rejected the employer's contention that the award should be denied enforcement because inconsistent with the public interest in highway safety, explaining;

> We agree that forcing a party to a collective bargaining agreement to break the law is against public policy, but no California statute has been called to our attention which would make it illegal to employ bus drivers who have previously shown bad judgment. [*Id.* at 644.]

Nor, under the principle adopted by the District of Columbia and Ninth Circuits, *could* there be any rational basis for applying a different legal standard to "safety" claims than to other invocations of public policy. Those courts, of course, would not enforce an arbitration award that ordered reinstatement of an individual whose continued employment was forbidden by laws or regulations enacted to protect the public safety. *See, e.g., World Airways, supra.*[2] But where (as here) government has

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[2] Respondent makes a feeble attempt to bring this case within *that* doctrine, by asserting that the reinstatement of the grievant

not deemed it necessary to forbid employment out of concern for public safety, respondent proffers no rationale for its contention that those circuits would view a court as freer to invalidate arbitration awards which in the court's view are inconsistent with public safety than to invalidate awards which in the court's view jeopardize other public interests.

In an analogous context, this Court has declared improper the judicial erection of hierarchies of public interest that are not rooted in legislative determinations. *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 263-64 (1975). And the Court seemingly applied that same concept to the enforcement of arbitration awards when it declared that a public policy, to justify non-enforcement, must "be 'ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests.'" *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 766 (1983), quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945). It is this passage in *Grace* which the District of Columbia and Ninth Circuits have understood to limit the public policy exception to conflicts with positive law.

The broader judicial power advocated by respondent—a power to refuse enforcement of arbitration awards reinstating employees out of concern for public safety even though the employer may lawfully act as the arbitrator has commanded—is inconsistent with the central principle underpinning the decisions of District of Columbia and

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here would have violated respondent's duty under the Occupational Safety and Health Act, 29 U.S.C. § 654, to provide a workplace "free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees" (Br. Op. 8-9). But neither the court below nor the district court found that compliance with the award in the instant case would have violated OSHA. Nor is that surprising, for it would be far-fetched indeed to suggest that OSHA forbids the employment of a factory worker simply because on one occasion there were non-usable traces of marijuana in his automobile in the company's parking lot.

Ninth Circuits. As explained by Judge Easterbrook, in a case where public safety was the basis for the employer's resistance to the award:

> A power to set aside awards on grounds of public policy, as distinct from rules of law, is too sweeping. A court lacks this power for the same reason the arbitrator does—the function of arbitrator and court is to carry out a contract, and contracts bind unless made unlawful by rules of positive law. [*E. I. Dupont de Nemours v. Grasselli Emp. Ass'n*, 790 F.2d 611, 618 (7th Cir. 1986) (concurring opinion), *cert. denied*, —— U.S. ——, 55 LW 3235 (1986).]

Where, as here, an arbitrator concludes that an employer has contracted to retain an employee, public policy is no more implicated than it would be were the employer to decide on its own to retain that employee. Whether respondent's safety thesis is valid thus turns entirely on the resolution of the existing conflict over the scope of the public policy exception to the enforceability of arbitration awards.

2. Respondent contends that the refusal to enforce arbitration awards directing reinstatement of marijuana possessors comports with the national labor policy, as reflected in decisions under the National Labor Relations Act cited at Br. Op. 10. The cited decisions are inapposite, and, indeed, the *pertinent* decision under the NLRA points quite the other way.

In each of the cases cited by respondent, the employer was accused of discharging employees because of their union activities, thus violating Section 8(a)(3) of the NLRA, 29 U.S.C. § 158(a)(3). In each, the Board found that union activities had played no part in the employer's decision, which instead had been motivated solely by the employee's drug or alcohol possession or consumption. Because § 8(a)(3) is implicated only when decisions are motivated by the exercise of rights under § 7 of the NLRA, 29 U.S.C. § 157, these fact-findings necessarily

established that § 8(a)(3) was not violated. That is all that the decisions cited by respondent held.

In the only truly analogous NLRA case we have found —*i.e.*, where an employee *was* found otherwise entitled to reinstatement under the NLRA, but the employer asserted that it would contravene public policy to reinstate the employee because he was a drug possessor—the NLRB ruled that reinstatement was not to be withheld on that ground. *Jacob E. Decker & Sons*, 244 NLRB 875, 878 (1979), *enf'd*, 636 F.2d 129 (5th Cir. 1981).

3. Respondent contends that the arbitrator's award was "fundamentally irrational and arbitrary," and that this constitutes an independent reason why it should not have been enforced (Br. Op. 10-11). Respondent concedes that this is not the ground upon which the lower courts vacated the award (*id.* at 11). Indeed, this claim was not even raised by respondent in the court of appeals, and thus cannot be invoked by respondent in this Court.

In any event, respondent's contention is frivolous, both as a matter of law and as a matter of fact. As a matter of law, an arbitration award which, as here, indisputably "draws its essence" from the collective bargaining agreement, may not be overturned because a court deems it "fundamentally irrational and arbitrary." As this Court has repeatedly held, where the parties have jointly selected the arbitrator and agreed that his decision will be the final and binding resolution of their dispute, the courts are not free to substitute their view of the merits of the contract issue for that of the arbitrator. *See, Steelworkers v. Enterprise Corp.*, 363 U.S. 593, 596 (1960); *Grace, supra*, 461 U.S. at 764.

And as a matter of fact, the award here is not "fundamentally irrational and arbitrary." To the contrary, the arbitrator's award, which is reprinted at Pet. App. 25a-53a, is intelligent, logical, careful, and erudite, and vindicates his status as a well-known and widely experienced

arbitrator (Pet. 4 & n.3).[3] We refute in the margin the side-swipes at the award mentioned in passing by the majority below—factors which the court below did not hold (or suggest) could justify denying enforcement to the award, but that respondent cites for its contention in *this* Court that the award can be invalidated on an alternate ground.[4]

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[3] In assessing whether there was "just cause" for the discharge, the arbitrator faithfully and conscientiously applied a seven-part test (App. 43a-44a) that is widely used by arbitrators. Elkouri & Elkouri, *How Arbitration Works* (4th Ed. 1985), p. 666 & n.86.

[4] The majority below stated that the arbitrator "criticize[d] the employer for not having the *investigation* of Cooper's incident conducted by 'some higher, detached company official,' notwithstanding that it was directed by the president of the company, assisted by the production supervisor" (App. 1a-2a, n.1, emphasis added). But the arbitrator fully understood that the president and production supervisor had *investigated* the incident (App. 39a-40a); the arbitrator's criticism was that the company had thereby departed from the customary practice that there be "some higher, detached Company official to assume and conscientiously perform the *judicial* role" following receipt of the investigator's findings (App. 47a; emphasis added).

The majority below suggested that the arbitrator equated drug possession with unauthorized reading on duty in terms of the propriety of discharge as a sanction (App. 2a, n.1). In fact, the arbitrator was addressing whether the Company rule listing drug possession among the "Causes for Discharge" connoted that discharge was the *automatic* sanction for that offense; finding that the same rule also listed unauthorized reading on duty as a dischargeable offense, and observing that "[i]t is difficult for this Arbitrator to see where both reading on duty and being involved with marijuana in the manner the Grievant is charged, have equal weight for immediate discharge," the arbitrator concluded that the rule did not mean that discharge was the *automatic* sanction for the offenses listed therein (App. 45a).

The majority below pointed to a supposed inconsistency between the arbitrator's findings (1) that there was a lighted marijuana cigarette in the car and (2) that the police observing the car *saw* no evidence of a cigarette burning (App. 3a n.2). But the arbitrator's point was that, in the abence of visual observation of the burning pattern that is normally observable when a marijuana cigarette is puffed in the dark, or of visual observation of a cigarette being passed between occupants, there was nothing to show that the grievant (who was sitting in the back seat of the car) had smoked the lighted cigarette found in the front seat ashtray (App. 49a-50a).

Finally, the majority below mocked the arbitrator's informing the parties at the outset of the arbitration hearing that he is a Creek American Indian (App. 1a, n.1). While we do not know the arbitrator's reason, it is a fair surmise that as the grievant was black, the arbitrator wished to disclose to the parties that he, too, was a member of a racial minority.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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